BRIEF IN SUPPORT OF THE FOREGOING PETITION

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit, on the merits of the case, filed March 14, 1940, is officially reported in 110 Fed. 2d at page 829. It is found on pages 76 to 81 of the Record. In this opinion the Court held that the judgment of the District Court, sustaining the respondent's affirmative defenses and dismissing petitioner's action, should be reversed. This decision has become final and is not here sought to be reviewed.

The Circuit Court did not file an opinion in connection with its decision on either of the petitioner's motions or in connection with either of the orders now sought to be reviewed.

The District Court did not file an opinion but did file findings of fact and conclusions of law (R. 47-54).

JURISDICTION

For a statement of the jurisdiction of this court see pages 4 and 5 of the foregoing petition.

STATEMENT OF THE CASE AND THE QUESTION INVOLVED

For a statement of the case and of the question involved see pages 2 to 5 of the foregoing petition.

ARGUMENT

PROOFS OF THE MATTERS WELL PLEADED IN THE DECLARATION WERE WAIVED BY THE STIPULATION OF COUNSEL

The stipulation to limit the issues in this case did not appear verbatim in the record in the Circuit Court of Appeals because it was made orally in open court and no bill of exceptions was filed. However, it is recited in the judgment which was prepared by respondent's counsel and presented by them to the court for signature.

We here quote the pertinent part of the judgment:

> "Now, on this 17th day of February, 1938, the above entitled cause came on for hearing pursuant to an agreement that the case be submitted to the court, without a jury, for its decision upon a trial limited to the issues raised by defendant's affirmative defenses to plaintiff's declaration as set forth in the amendment to the defendant's pleas filed herein on February 17, 1938."

We quote the stenographer's transcript of the agreement, which we quoted in our motion to modify and clarify the mandate and which stood unchallenged by the respondent in the Circuit Court of Appeals (R. 88). It confirms the stipulation as recited in the judgment.

> "Mr. Smith (Assistant District Attorney): Your Honor, before we proceed I think I would like to make a statement on the record as to the conference in Your Honor's chambers the other day. At that time we were before Your Honor on a petition upon request of the attorney for the plaintiff. At that time it was stated the plaintiff would insist upon their right to a trial by jury and it was thought the case would last approximately six days or a week. At that time we stated to Your Honor that we have

a defense in the nature of a plea at bar that would take only a short time to present and so dispose of the entire case, and that is irrespective of what showing plaintiff might make on the merits. At that time, Your Honor said you would hear us today on that motion, and I believe defendants stated they did not want to be in court a week on a jury trial, if it could be disposed of in this way, and that the defense is upon a bond. That is a correct statement, is it not, for the record, as to how we happen to be here at this time?

Mr. McCauley (Counsel for Plaintiff): I believe so."

This stipulation to limit the issues is open to but one reasonable interpretation. That interpretation is that all issues raised by the pleadings, other than those raised by the amended affirmative defenses, were eliminated and the defendant waived proof of the material allegations of the plaintiff's declaration.

The respondent likewise did not challenge our interpretation of the stipulation in the Circuit Court of Appeals.

The decided cases, construing stipulations to limit the issues (as distinguished from stipulations to eliminate a single issue) hold that proof on all other issues is thereby waived.

See: *Connell Bros. vs. Diederichsen Co.*, 213 Fed. 737;

Fire Association of Philadelphia vs. Crawford, 54 S. W. 2d 181;

Esch vs. Foster, 168 So. 229; 133 Fla. 905.

In *Connell Bros. vs. Diederichsen Co.*, the Circuit Court of Appeals for the Ninth Circuit held that though the defendant denied the plaintiff's allegations, that it was a firm or company, proof thereof was waived by a stipulation that the trial should be had only on the issues of breach of contract and damages.

In *Fire Association vs. Crawford,* the court held that an agreement, that the only issue was the amount of damages recoverable under a fire insurance policy, constituted an acknowledgment that all other matters relating to recovery sufficiently appeared.

The Supreme Court of Florida, in *Esch vs. Foster,* held that a stipulation which prescribes the issues on which the case is to be tried, unlike a stipulation which merely eliminates a single issue, amounts to a binding waiver and elimination of all issues not included.

THE STIPULATION IS A BINDING AGREEMENT WHICH WILL SUPPORT THE ENTRY OF JUDGMENT FOR THE PLAINTIFF

The stipulation was affirmatively assented to by both parties and therefore has the same binding effect and potency as an order of the court, agreed to by the parties, to the same purpose.

Brookings State Bank vs. Federal Reserve Bank of San Francisco, 291 Fed. 659;

United States vs. Davison, 1 Fed. 2d 465, affirmed 9 Fed. 2d 1022.

Stipulations made in open court, unlike stipulations between attorneys not made in open court, need not be in writing signed by them.

Lewis vs. Wilson, 151 U. S. 551; 38 Law Ed. 267.

It is well settled law that counsel may stipulate to limit the issues in a case.

Tucker vs. Alexander, 275 U. S. 228; 72 Law Ed. 253;

Schley vs. Pullman Car Co., 120 U. S. 575; 30 Law Ed. 789;

Connell Bros. Co. vs. H. Diederichsen Co., 213 Fed. 737;

Starkpole vs. Northern Pacific R. R. Co., 121 Fed. 389;

Fire Ass'n. of Philadelphia vs. Crawford, 54 S. W. 2d, 181;

Esch vs. Foster, 168 So. 229; 123 Fla. 905.

THE DISTRICT ATTORNEY HAD AUTHORITY TO ENTER INTO THE STIPULATION MADE IN THIS CASE

The statute authorizes the District Attorney to appear for and defend suits against the Collector of Internal Revenue (Revised Statutes Sec. 771, 28 U. S. C. A. 485). It does not limit his power or direct the manner of performing his duty in cases against Internal Revenue Officers.

See: *Sage vs. U. S.*, 250 U. S. 33; 63 Law Ed. 828;

Atkins vs. Bender, 18 Fed. 2d 357;

Fletcher vs. Booth, 101 Fed. 2d 676;

Castell vs. U. S., 98 Fed. 2d 88.

THERE IS NO NECESSITY FOR A NEW TRIAL OR PARTIAL NEW TRIAL

The District Court made special findings of fact which completely covered all issues except those withdrawn by the stipulation of counsel limiting the issues and except the amount of damages. The correctness of these findings was not contested upon appeal. The amount of damages is liquidated, the entire deficiency income tax assessment

being illegal and void. Therefore, there is no necessity for a new trial, in whole or in part, because there is no need either for further evidence to be submitted or for further facts to be found.

If respondent's counsel did not see fit on the trial to introduce all of the available evidence in support of his theory, he should not be given a second opportunity to bolster his case when the facts as proved by him and as found specially by the court are undisputed.

Nevertheless the Circuit Court amended the mandate to order a new trial.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

The question of procedure raised in the Circuit Court of Appeals by the motion to modify and clarify the mandate, has been before this court on at least five occasions.

In the case of *Fort Scott vs. Hickman,* 112 U. S. 150, 28 Law Ed. 636, a jury was waived and the trial court made special findings of fact. The Supreme Court reversed the judgment for the plaintiff and remanded the case for the entry of judgment, saying:

> "In cases like the present one the proper practice is to direct a judgment for the defendant instead of awarding a new trial."

In *Allen vs. St. Louis National Bank,* 120 U. S. 20, 30 Law Ed. 573, this court on reversing a judgment for the plaintiff held:

> "all the facts of the case being ascertained by the special finding of the court below, as they would be by a special verdict of a jury, there is no reason for awarding a new trial, but there must be a general judgment for the defendants."

To the same effect is *Cleveland Rolling Mill Co. vs. Rhodes,* 121 U. S. 255, 30 Law Ed. 920.

In the case of *Forged Steel Wheel Co. vs. Lewellyn,* 251 U. S. 511, 64 Law Ed. 380, this court refused a request to remand the case for a new trial, saying:

> "Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court and not remanding the case for a new trial. There was no objection made to that action and no request for a remand of the case; and besides there was nothing to retry. The case involves only propositions of law."

Likewise the instant case involves only propositions of law. The petitioner offered no evidence on the trial. The respondent offered evidence to sustain his affirmative defenses and the court found the facts as prepared by his counsel. On the appeal, no bill of exceptions having been included in the record, the only question before the Circuit Court of Appeals was the question of law of whether or not the facts as found supported the judgment of dismissal. The answer to that question in turn depended upon the proper construction of the bond in the light of the circumstances under which it was given. The Circuit Court of Appeals, having only to decide questions of law, was in a position to and should have directed the entry of judgment.

The case of *Retzer vs. Wood,* 109 U. S. 185, 27 Law Ed. 960 is directly in point. The action is similar to the instant case in that the action was to recover Internal Revenue taxes illegally exacted. The case was tried by the court without a jury; the trial court made special findings of fact and held that the taxes were illegally exacted but that the action was barred by the Statute of Limitations. The Supreme Court reversed the judgment because the Statute of Limitations had not been pleaded. The defendant asked that "if the judgment be reversed, the case be remanded

so the Statute of Limitations may be pleaded." The Supreme Court directed the entry of judgment for the plaintiff, saying:

> "The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant."

The only difference in the case at bar and *Retzer vs. Wood* is that in the instant case proof of the illegal exaction was waived by the stipulation of counsel, made in open court, limiting the issues to those raised by the defendant's affirmative defenses as set forth in the amendment to the defendant's pleas, whereas in the Retzer case proofs were submitted and the court found in its special findings that the tax was illegally exacted. The difference is not material, because by limiting the issues, the parties agreed that the material facts, well pleaded, relative to the illegal tax, sufficiently appeared.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE THIRD AND EIGHTH CIRCUITS

The Circuit Court of Appeals for the Third Circuit in *Oliver vs. Mt. Union Tanning & Extract Co.*, 264 Fed. 601, 608, reversed a judgment for the plaintiff in an insufficient amount and directed the entry of judgment for the plaintiff in the larger amount claimed, saying:

> "We have no doubt that we have the power to direct such a judgment to be entered as the pleadings and the special findings of fact of the court below require."

The Circuit Court of Appeals for the Eighth Circuit in *Rathbone vs. Board of Commissioners of Kiowa County, Kansas,* 83 Fed. 125, 132, reversed a judgment for the defendant and ordered a new trial in a case tried before the court without a jury on an agreed statement of facts. The plaintiff filed a motion to modify the judgment and the mandate to direct the entry of judgment for the plaintiff. The court granted this motion, saying:

> "* * * The motion is based upon the ground that as a jury was duly waived, and the case was tried upon an agreed statement of facts, and the damages recoverable are a liquidated sum, there is no occasion for a second trial. We are satisfied that the motion is well founded on the following cases. * * * Therefore the judgment will be modified as prayed and the Circuit Court will be directed to enter judgment against the defendant county in the sum of $3,831.60 with interest thereon at the rate of 6 per cent per annum from July 1, 1894, to the date of entry."

The rulings in both of these cases are the direct antithesis to the decisions of the Circuit Court of Appeals in this case.

THE SUPREME COURT SHOULD EXERCISE ITS POWER OF SUPERVISION IN THIS CASE

Petitioner instituted this action in the District Court on August 2, 1929 and it was at issue shortly thereafter. Through no fault of the petitioner or its counsel the case was not called for trial until February 17, 1938, approximately nine years later. An additional two years time expired before the case was decided upon appeal.

Petitioner intended to insist upon its right to a jury trial. Respondent's counsel apparently felt that the only questions necessary for the court to consider were the running

of the statute of limitations and the terms of the bond executed by the taxpayer to secure the payment of the tax and obtain an extension of time for payment, which constituted their second and third affirmative defenses. They said that the case could be disposed of on the special defenses which would take only a short time to present "and that is irrespective of what showing plaintiff might make on the merits." Counsel did not wish to be in court a week's time if the only defenses to be relied upon were to be defendant's second and third special defenses. The parties by their counsel stipulated in open court to waive a jury and limit the issues to those raised by the second and third affirmative defenses. The case proceeded to trial on that basis.

After the Circuit Court of Appeals reversed the judgment for the defendant, petitioner filed its motion to modify the mandate to direct the entry of judgment for the plaintiff. This motion was not opposed by respondent's counsel.

The Circuit Court of Appeals in amending the mandate to order a new trial has acted contrary to precedent. Its order is ambiguous in that it does not designate the scope of the new trial. In deciding our motion to reconsider, it refused to answer the question as to whether it is to be a first trial on the merits or a second trial on the affirmative defenses, or both.

In ordering a new trial, it has further subjected the petitioner to unnecessary expense and delay in obtaining justice and to the hazards incident to litigating its claim, after the lapse of such a long period of time. In the meantime, many of the material witnesses have died or their whereabouts have become unknown and important records not in the possession of Petitioner or its counsel have become lost or destroyed.

In ordering a new trial the Circuit Court has also given the respondent a second opportunity to prove his claims

with respect to his affirmative defenses, which were or should have been fully litigated on the first trial. If the new trial is to be on the merits, it also gives the respondent another opportunity to sustain defenses which his counsel thought unnecessary or not worthwhile advancing on the first trial.

Whether or not the stipulation limiting the issues on the first trial would govern on a second trial cannot be ascertained with certainty.

The position in which the Circuit Court of Appeals has placed the petitioner by ordering a new trial contrary to petitioner's request and without any request from the respondent, and contrary to the authority of the adjudicated cases, seems to us to call for an exercise of the supervisory powers of this court.

CONCLUSION

For the reasons above stated and on the authorities above cited, we respectfully submit that a writ of certiorari should issue as prayed.

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